SYKT ONG YOKE LIN SDN BHD

v.

GIANT CASH & CARRY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-344-1999]
30 AUGUST 2000

CIVIL PROCEDURE: *Action - Cause of action - Whether cause of action premature*

CONTRACT: *Assignment - Whether plaintiff has legitimate claim over the money - Whether assignment was a fraud against the plaintiff - Whether deed of assignment conditional - Balance of Convenience - Whether judgment would cause defendant to have breached the deed of assignment*

The 2nd defendant was the main contractor of the 1st defendant for the construction and completion of the 1st defendant's hypermarket. The 2nd defendant then nominated the plaintiff as subcontractor for supplying the air-conditioning and mechanical ventilation systems. The 2nd defendant later assigned the monies due under the contract to the 4th defendant. The plaintiff had completed the works and a certificate of practical completion had been issued. However, it was alleged that the plaintiff had not received the full payment for work done and thus the instant application for injunctive reliefs. The issues before the court were (i) whether there was a contractual relationship between the plaintiff and the 1st defendant; (ii) whether there was an instrument that created trust in the instant case; (iii) whether the 2nd defendant was a trustee of the plaintiff; and (iv) whether the assignment was absolute or conditional.

Held:

[1] There was no privity of contract between the 1st defendant and the plaintiff.

[2] The 1st defendant was bound by the deed of assignment to pay the proceeds to the 4th defendant. In the event the injunction in prayer (i) of the application was granted, it would cause hardship on the 1st defendant as it would cause the 1st defendant to commit a breach of the terms of the deed of assignment.

[3] In the instant case, there was no instrument or writing to manifest the existence of trust.

[4] Based on the evidence, the 2nd defendant was not a trustee of the plaintiff

[5] As the plaintiff did not sign the statement of final account then no payment under the final account was due to the plaintiff. Thus, the plaintiff's claim was premature. Therefore, on the balance of convenience, the plaintiff's application was clearly in favour of the 2nd defendant.

[6] From the evidence adduced, the 3rd defendant had performed what the plaintiff now sought the 3rd defendant to perform. To accede to the plaintiff's application in favour of the plaintiff would simply mean that the plaintiff be given judgment without trial.

[7] The plaintiff had no legitimate claim to the moneys payable by the 1st defendant to the 2nd defendant under the contract since it had already been assigned to the 4th defendant. In fact the assignment was created and registered before the appointment of the plaintiff as nominated subcontractor.

[8] Although the assignment was conditional, it would not make any difference whatsoever, as the validity of the assignment could never be questioned.

[Application dismissed with costs.]

Case(s) referred to:

Adlington v. Cann [1744] 3 Atk 141 ***(refd)***

Bank of Commerce (M) Bhd v. Mahajaya Property Sdn Bhd [1997] 3 CLJ Supp 413 ***(refd)***

Barnes v. Addy [1874] 9 Ch App 244 ***(refd)***

De Biel v. Thomson [1841] 3 Beav 469 ***(refd)***

Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd [1915] AC 79 ***(refd)***

Dye v. Dye [1884] 13 QBD 147 ***(refd)***

Gibb & Co. v. Malaysia Building Society Bhd [1982] 1 MLJ 271 ***(foll)***

Kronheim v. Johnson [1877] 7 Ch D 60 ***(refd)***

Joo Yee Consortium v. Diethelm Industries [1990] 2 MLJ 66 ***(refd)***

Lau Kee Ko & Anor v. Paw Ngi Siu [1974] 1 MLJ 21 ***(refd)***

Lee You Sin v. Chong Ngo Khoon [1982] 2 MLJ 15 ***(refd)***

Leman v. Whitley [1828] 4 Russ 423 ***(refd)***

Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 ***(refd)***

Mool Chand Behari Lal v. SD Chand & Co AIR (34) 1947 Lahore 112 ***(refd)***

National Provincial and Union Bank of England v. Charnley [1924] 1 KB 431 ***(refd)***

Pasuma Pharmacal v. Mc Alister [1965] 1 MLJ 221 ***(refd)***
Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 ***(refd)***
Plowright v. Lambert [1885] 52 LT 646 ***(refd)***
Randall v. Morgan [1805] 12 Ves 67 ***(refd)***
Re Cozens, Green v. Brisley [1913] 2 Ch 478 ***(refd)***
Re Lin Securities (Pte) [1988] 2 MLJ 137 ***(refd)***
Riddle v. Emerson [1682] 1 Vern 108 ***(refd)***
Royden (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd [1991] 3 CLJ 2935 ***(refd)***
Southern Estate Sdn Bhd & Anor v. Tractors Malaysia Bhd [1996] 4 CLJ 344 ***(refd)***
Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 ***(refd)***
State of Kerala v. M/S United Shippers and Dredgers Ltd AIR [1982] Kerala 281 ***(refd)***
Sutcliffe v. Thackrah And Others [1974] 2 WLR 295 ***(refd)***
Tierney v. Wood [1854] 19 Beav 330 ***(refd)***
Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd [1987] 2 MLJ 192 ***(foll)***
Willis v. Willis [1740] 2 Atk 71 ***(refd)***

Legislation referred to:
Contracts Act 1950 ss. 74, (1), (2), 15
Civil Law Act 1956, s. 4(3)
Trustee Act 1949, ss. 2(2), 3(1), 39, 40, 41, 42, 43, 44, 63, 64

Companies Act (Cap. 50 1988), [Sing] ss. 111(2), 280(1), 327(2)

Other Source(s) referred to:
Chitty on Contracts, vol 1, 27th edn, para 19-005
Law and Practice of Construction Contract Claims, Chow Kok Fong, p 226
The Law Relating to Building Contracts, Chow Kok Fong, chap. 11
The Malaysian Standard Form of Building Contract (PAM/ISM 69), Prof. Vincent Powell - Smith, 1990, pp 132, 133

For the plaintiff - Devahi Rosalind John; M/s Atma Singh Veriah & Co
For the 1st defendant - Catherine Choong Hor Kiow; M/s Catherine Choong & Co
For the 2nd defendant - Felix Dorairaj; M/s Dorairaj, Low & Teh
For the 3rd defendant - Joseph Yeo; M/s Joseph Yeo
For the 4th defendant - Sean Yeow Huang Meng; M/s Lee Hishammuddin

Reported by Izzaty Izzuddin

a

JUDGMENT

Abdul Malik Ishak J:

Injunctive Reliefs In Encl. 3 – The Summons In Chambers

b The plaintiff sought by way of injunctive reliefs in encl. 3 against the first, second and third defendants for the following orders:

(i) an injunction restraining the first defendant (Giant Cash & Carry Sdn Bhd), their servants and/or agents from paying out the monies due to the plaintiff under the statement of final account to the fourth defendant (Malayan Bank c Berhad) and/or the second defendant (Bennes Engineering Bhd) and/or their servants and/or agents;

(ii) an injunction restraining the second defendant, their servants and/or agents from receiving payment on the statement of final account from the first defendant;

d

(iii) an injunction directing the third defendant (Regional Development Consortium Arkitek) to carry out their duties, namely :

(a) to act on the complaint of the plaintiff that the second defendant has defaulted in the payment of the 13th interim certificate;

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(b) to request the second defendant to furnish reasonable proof that all amounts stated as due and included in the previous certificates in respect of the total value of works executed, material or goods supplied by the plaintiff have been discharged;

(c) to issue a certificate to the effect that the sum of RM146,050.00 payable f to the plaintiff under the 13th interim certificate has not been made by the defendant (it should be the second defendant) to the plaintiff which would have enabled the first defendant to pay the said sum directly to the plaintiff;

(d) to ensure that no deductions shall be made for the alleged liquidated g and ascertained damages ("LAD") charges from the interim payments;

(e) to issue a certificate to the effect that the second defendant has failed to make payment of the sum of RM146,050.00 to the plaintiff and further to certify that the second defendant is not entitled to make any deductions from the 13th interim payment for the alleged LAD.

h

(iv) an order directing the first defendant and/or their servants and/or their agents to pay the final contract sum directly to the plaintiff;

(v) an order that the first defendant and/or the second defendant and/or their servants and/or their agents pay the plaintiff the sum of RM146,050.00 due i on the 13th interim certificate to the plaintiff with immediate effect;

(vi) costs;

(vii) such other relief as this Honourable Court may deem fit to order.

Several affidavits were advanced by the parties. Each trying to outwit the other. Each galvanising whatever material for its own cause. The plaintiff relied on nine affidavits as seen in encls. 2, 6, 16, 19, 20, 21, 29, 30, and 31. While the first defendant filed three affidavits in opposition as seen in encls. 11, 18 and 32; the second defendant too filed three affidavits in opposition as reflected in encls. 9, 22 and 35. On the other hand, the third defendant filed two affidavits in opposition as seen in encls. 13 and 25. Acting in unison, the fourth defendant also filed two affidavits in opposition as evidenced in encls. 13A and 26.

Background Facts

It would be ideal to identify the parties in order to get a clearer picture of the disputes between them. At all material times, the plaintiff was the nominated subcontractor of the second defendant. The second defendant was the main contractor of the first defendant for the construction and completion of superstructure works for the proposed hypermarket on Lot PTD 116058 and Lot PTD 116059, Mukim Plentong, in the district of Johor Bahru for the first defendant (hereinafter referred to as the "Giant hypermarket'). In short, the first defendant was the employer or owner of the Giant hypermarket. The contract between the first defendant and the second defendant can readily be seen in exhibit "TUH 1" as exhibited in encl. 11. The third defendant was the architect of the Giant hypermarket and the third defendant was employed by the first defendant. The fourth defendant, on the other hand, was the bank to whom the monies due under the contract have been assigned under the deed of assignment dated 9 September 1997 and that deed of assignment was styled as the "loan agreement cum assignment of contract payment" between the second defendant and the fourth defendant and it was exhibited in exhibit marked "TUH 3" of enc. 11.

As a nominated subcontractor of the second defendant, the plaintiff had to supply, deliver, install, test, commission and maintain the air-conditioning and mechanical system of the Giant supermarket and this was amply documented by way of a letter of acceptance by the second defendant of the plaintiff as the nominated subcontractor as reflected at exhibit marked "SSH 1" of encl. 2 which was worded as follows:

a **Bennes**
Engineering Berhad
Our ref: GPJ/AC/023/QS4/A2

07 October 1997

b Syarikat Ong Yoke Lin Sdn Bhd
No. 135, Jalan SS 15/5A
Subang Jaya
47500 Petaling Jaya

Dear Sirs

c RE: PROPOSED HYPERMARKET DEVELOPMENT ON LOTS PTD 116058 & 116059, MUKIM PLENTONG, DAERAH JOHOR BAHRU FOR GIANT CASH & CARRY SDN BHD NOMINATED SUB-CONTRACTOR FOR AIRCONDITIONING & MECHANICAL VENTILATION SERVICES

d 1. We are pleased to accept you as our Nominated Sub-Contractor for the above services for the price, not subject to any fluctuation of foreign exchange rate of Ringgit Malaysia: Two Million Five Hundred And Ten Thousand Only (RM2,510,000.00).

e 2. The acceptance of this sub-contract shall unequivocally be subject to the compliance of the following terms, condition, letters and documents in addition to all conditions stated in the Main Contract.

a) Your compliances with the Consulting Engineers Norman Disney & Young Sdn Bhd's specification and drawings, Ref no: 3245-1/A2 dated September 1997.

f b) Norman Disney & Young's Addendum No. 1 letter ref: 3245-1/A2/Lta-3292 dated 17 September 1997.

c) Your tender submission ref: GC&C/TGC&C/HHL/9709/6987 dated 19 September 1997.

g d) Norman Disney & Young's letter ref: 3245-1/A2/Lta-3343 dated 23 September 1997.

e) Your clarification letter ref: GC&C/TGC&C/HHL/9709/6987R-1 dated 26 September 1997.

h f) Your clarification letter ref: GC&C/TGC&C/HHL/9710/6987R-2 dated 6 October 1997.

3. **Shop Drawings**
You are required to submit your shop drawings within two (2) weeks from the date of this letter.

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4. **Insurance**
You are required to deposit all necessary insurance policies required under the conditions of sub-contractor prior to the commencement of any works.

5. **Performance Bond**
You are required as a precedent to the commencement of any work under this contract to provide the Guarantee of a Bank established in Malaysia to be jointly and severally bound with you as the Sub-Contractor and us as the Main Contractor for the sum of Ringgit Malaysia: One Hundred and Twenty Five Thousand and Five Hundred Only (RM125,500.00) being 5% of the awarded Contract sum for the due performance of the contract and the Guarantee shall be valid for the full contract period. The Guarantee shall be extended should any extension of time be granted.

6. The Liquidated and Ascertained Damages for delay in meeting the deadline shall be RM10,000.00 per day.

7. **Completion Period**
You have undertaken to commence the Sub-Contract works immediately upon receipt of this letter and to complete the whole of the Sub-Contract by 22nd October 1997. You are required to submit to us your programme of works together with your manpower chart and list of plants and equipment to be deployed for the installation work and co-operate/co-ordinate with other contractors appointed by Employer or us on the site.

8. **Payment**
. The payment shall be as per PAM Conditions.
. Maximum 75% of material cost upon delivery at site.
. The balance will be paid progressively in accordance with works done.

9. Until the formal sub-contract documents are prepared and executed, your tender together with the duly signed copy of this letter shall constitute a binding contract between you and us.

This letter is sent to you in triplicate. Please sign and return 2 copies (with original) to us and retain one copy for your record.

Yours faithfully
BENNES ENGINEERING BERHAD
Sgd. (Illegible).
LEE HOCK SOON
Director
c.c. Giant Cash & Carry Sdn Bhd
Regional Development Consortium
Norman Disney & Young Sdn Bhd
Perunding Aziz Sehu
JUB Padu Sdn Bhd

It would be ideal to refer to a book entitled "The Law Relating to Building Contracts", cases and materials by Chow Kok Fong where at chapter eleven under the sup-topic of "Nominated Sub-Contractors", the learned author said:

> Most standard forms contain provisions which grant the employer the right to nominate sub-contractors for certain works or supplies. The usual procedure is for the architect to negotiate terms with the sub-contractor and on settlement of the terms of the sub-contract, the main contractor is directed to enter into the sub-contract with the selected sub-contractor. This machinery of nomination was supposedly devised to afford the employer (through his architect) a means of controlling the quality of work covered by the sub-contract while at the same time ensuring that a competitive price is secured for the sub-contract works. However in practice it is doubtful whether these results are ever achieved, and instead the employer is often confronted with a set of complicated and tortuous provisions designed to regulate the operation of the nomination machinery while at the same time preserving the so called 'chain of responsibility' between the parties involved.
>
> Considerable difficulties have been encountered with the system of nominated sub-contractors. Firstly it has proved difficult to make main contractors accountable for the actions of sub-contractors since it is often presumed that the main contractor has very little control over the sub-contractor's work. The common standard forms apparently accept this rationale and frequently provide that in the event of delay on the part of nominated sub-contract works, the main contractor shall be given an extension of time; a situation which leaves the employer without any remedy for a breach on the part of the sub-contractor. See *Westminster City Council v. J. Jarvis & Sons Ltd and Anor* (1970) 1 All E.R. 943 *infra*. The employer is next further exposed to claims for delay if there is late nomination or if the original nominated sub-contractor having fallen out for same reason fails to renominate: see *North West Metropolitan Regional Hospital Board v. T.A. Bickerton & Sons Ltd* (1970) 1 All E.R. 1039 *infra.* Thirdly as a result of the decision in *Gloucestershire County Council v. Richardson* (1968) 2 All E.R. 1181 considered earlier, it appears that the contractor does not warrant the quality or fitness of the materials or work supplied or undertaken by the contractors in respect of whose nomination the main contractor has little or no influence. This feature, together with the fact that the descriptions of works intended to be covered by nominated sub-contracts are often couched in very ambiguous terms in the main contract, frequently frustrate project planning and quality control efforts.

Reverting back to the mainstream, it must be emphasised that the plaintiff completed the works and this can readily be confirmed by reference to exhibit "SSH 7" of encl. 2 which carried two letters, one of which was from the second defendant and the other was from the third defendant. I shall now reproduce these two letters in succession. The first letter was worded in this way:

Bennes
Engineering Berhad
(Company Registration No. 151934-D)

December 14, 1998

RBK Landscape Sdn Bhd	:	Mr. Suhaimi
Kone Elevators	:	Mr. Michael Loh
Tractors Malaysia	:	Mr. Hoo We Khin
SKLA Eng Sdn Bhd	:	Mr. T.S. Mok
OYL Sdn Bhd	:	Mr. Tin Heng Huat
ENP Engineering Sdn Bhd	:	Mr. Steven
MasterSeal	:	Mr. Goh

RE: PROPOSED HYPERMARKET FOR GIANT CASH & CARRY SDN BHD ON LOT PTD 116058 & PTD LOT 116059, JOHOR BAHRU
Phase 2 Handing Over – (Grid Ia-21/Q-Y)

Attached letter from Messrs Regional Development Consortium which is self explanatory for your perusal.
Regards,
Sgd. (Illegible).
(Tiew Ah Boo)
C.C. GCC - Mr. Francis Teng/Mr. B.H. Lim
RDC - Mr. Siow/Mr. Farik Ghaffar
NDY - Mr. Tey C.H.
JUB - Mr. K.T. Lee
BEB - Mr. C.K. Wah/Miss Siti
CLP - Miss Michael Yong

and the second letter was worded thus:

REGIONAL DEVELOPMENT CONSORTIUM

Our ref: GCC/M9617/BEB/96(127)
11th December 1998
Bennes Engineering Berhad
No. 50, Jalan 10/116B
Kuchai Entrepreneurs Park
Jalan Kuchai Lama
58200 Kuala Lumpur
Attention: Mr. Edward Lee
Dear Sir,

CONSTRUCTION AND COMPLETION OF SUPERSTRUCTURE WORKS FOR CADANGAN MEMBINA SEBUAH PASARAYA (HYPERMARKET) DI ATAS LOT PTD 116058 & 116059, MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM
- Handing Over Phase 2 (Grid Ia-21/Q-Y)

With reference to above, we wish to inform you that subject to the notification of any outstanding items, or of any defects, shrinkages, and other faults, the phase 2 (Grid Ia 21/Q-Y) works had been completed and taken into possession by Giant Cash & Carry Sdn. Bhd. on 16th July 1998.

Thank you.

Yours faithfully,

REGIONAL DEVELOPMENT CONSORTIUM

Arkitek

Sgd. (Illegible).

C.F. SIOW

c.c. Giant Cash & Carry Sdn. Bhd.	-	Mr. Francis Teng
	-	Mr. B.H. Lim
	-	Mr. P.M. Kook
JUB Padu Sdn Bhd	-	Mr. K.T. Lee
Norman Disney & Young Sdn Bhd	-	C.H. Tey

The certificate of practical completion was also exhibited in exhibit "SSH-7A" as reflected in enclosure 2 and it was worded as follows:

REGIONAL DEVELOPMENT CONSORTIUM

CERTIFICATE OF PRACTICAL COMPLETION

Name of Project: Construction And Completion Of Superstructure Works For Cadangan Membina Sebuah Pasaraya (Hypermarket) Di atas Lot PTD 116058 & 116059, Mukim Plentong, Daerah Johor Bahru, Johor Darul Takzim
- Phase 1

To: Bennes Engineering Berhad
Penthouse, Lot 271, Jalan Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur

In accordance with our Standard Form of Contract, we certify that subject to the making good of any outstanding items, or of any defects, shrinkages and other faults which appear during the defect liability period.

The works completed to our satisfaction and taken into possession:	April 2, 1998
and that said defects liability period will end on :	April 2, 1999

We declare that one moiety of the retention moneys deducted under the previous certificates in respect of the said works or sections thereof is to be released.

Issued by: REGIONAL DEVELOPMENT CONSORTIUM
Arkitek
Sgd. (Illegible).
SIOW CHIEN FU

Original to : Gen: Contractor [ ]
Copies to:
Client [/] Quantity Surv. [/]
Structural Engr. [/] M & E Engr. [/]
Project Manager [ ]

The covering letter enclosing the certificate of practical completion was worded in this way:

REGIONAL DEVELOPMENT CONSORTIUM
Arkitek

Our Ref: GCC/M9617/BEB/96(080)
2 April 1998
Bennes Engineering Berhad
Penthouse, Lot 271, Jalan Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur
Attn: Mr. Edward Lee
Dear Sirs,
CONSTRUCTION AND COMPLETION OF SUPERSTRUCTURE WORKS FOR CADANGAN MEMBINA SEBUAH PASARAYA (HYPERMARKET) DI ATAS LOT PTD 116058 & 116059 MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM
- Certificate of Practical Completion (Phase 1)

We are pleased to inform you that we have inspected the Phase 1 Building works and it appeared satisfactory.
Enclosed please find the Certificate of Completion with its Schedule of Outstanding Items for your immediate action.
Thank you.
Yours faithfully,
REGIONAL DEVELOPMENT CONSORTIUM
Arkitek
C.F. SIOW
Enc.
c.c. Giant Cash & Carry Sdn. Bhd. - Mr. Francis Teng
Perunding Aziz Sehu Sdn. Bhd. - Tn. Hj. Aziz
Norman Disney & Young Sdn. Bhd. - Mr. Tan Joo Chee
JUB Padu Sdn. Bhd. - Mr. K.T. Lee/Mr. N.S. Hoh
FG/shs

This was clearly a case where the plaintiff had completed the works and the certificate of practical completion had been issued.

It must however not be forgotten that by a letter dated 26 August 1997, the fourth defendant gave notice to the first defendant of the assignment by the second defendant of all proceeds from its contract with the first defendant to the fourth defendant and that notice was given pursuant to the "loan agreement cum assignment of contract payment" dated 9 September 1997 as alluded to earlier between the second defendant and the fourth defendant. That notice was worded in this way (see p. 45 to p. 46 of exhibit "TUH 2" of encl. 11):

Maybank
Your ref: GCC/PD/JB/013/97
Our ref: 2714310/odpc/LYS/LCH/309519/odpc36/97
Aug 26, 1997.
The Managing Director
Giant Cash & Carry Sdn. Bhd. (Co. Regn. No. 250115U)
672 & 673 USJ 1, Subang Jaya
47500 Petaling Jaya.
Dear Sir,
Re: Contract for Construction and Completion of Main Structure Works for "Cadangan membina sebuah pasaraya (hypermarket) di atas Lot PTD 116058 & 116059 Mukim Plentong, Daerah Johor Bahru, Johor Darul Takzim

---

We refer to the above contract and hereby give you notice that by an Assignment dated (9 September) 1997, all sums due and payable under the contract to Bennes Engineering Bhd. (formerly known as Bennes Engineering Sdn. Bhd.) has been assigned absolutely to us.
You are, accordingly, required to remit all the progress payments direct to Malayan Banking Berhad (Maybank) at its branch office at No. 92, Jalan Tun H.S. Lee, 50000 Kuala Lumpur for the account of 'Maybank (Bennes Engineering Bhd.) A/c No. 014310309519' as and when the same shall become due and payable in respect of this notice on the duplicate hereof.
Thank you.
Yours faithfully,
For Maybank
Sgd. (Illegible).
LEE YAT SUN
Branch Manager
Jalan Tun H.S. Lee
Kuala Lumpur.
c.c. Bennes Engineering Bhd.
M/S Nashill & Co.
CAC Region F.T.

Cont… 2/

Page 2

Re Contract for Construction and Completion of Main Structure Works For "Cadangan membina sebuah pasaraya (hypermarket) di atas Lot PTD 116058 & 116059 Mukim Plentong, Daerah Johore Bahru, Johor Darul Takzim

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We, Bennes Engineering Bhd. hereby confirm the assignment of above referred to and hereby authorise payment to Malayan Banking Berhad (Maybank). Any such payment shall, to the extent of such payment, be a discharge of such sum due to us.
Sgd. (Illegible).
Authorised Signatories/Chop
Bennes Engineering Bhd.
Date:
We, Giant Cash & Carry Sdn. Bhd. (Co. Regn. No. 260116U) hereby acknowledge receipt of Maybank letter 'Subject always that Bennes Engineering Bhd has not defaulted or is in breach of the terms of the agreement dated 30th June 1997 and strictly without prejudice to any of our rights under the said Agreement including but not limited to our right of set-off the progress payments against any payments claims and/or damages due to us.'
GIANT CASH & CARRY SDN. BHD.
Sgd. (Illegible).
Director
Authorised Signatories/Chop
Date:

and it was followed by the Schedule thereto (see p. 47 of exhibit "TUH 2" of enclosure 11):

SCHEDULE
IRREVOCABLE LETTER OF INSTRUCTION

To:
GIANT CASH & CARRY SDN BHD
NO. 672 & 673, USJ 1
SUBANG JAYA
47500 PETALING JAYA
SELANGOR DARUL EHSAN
Dear Sirs,

RE: Contract No (REF. No. GCC/PD/JB/013/97) between BENNES ENGINEERING BHD and yourselves in respect of construction and completion of Main Structure Works for Cadangan Membina Sebuah Pasaraya (Hypermarket) di atas Lot PTD 116058 & 116059 Mukim Plentong Daerah Johor Bahru, Johor Darul Takzim

We refer to the above contract and hereby authorise you to remit all the progress payments due to us under the Claim Certificates/Bills direct to MALAYAN BANKING BERHAD at its branch office at No. 92, Jalan Tun H.S. Lee, 50000

Kuala Lumpur for the account of 'MAYBANK BENNES ENGINEERING BHD' Account No. 014310309519 as and when the same shall become due and payable in respect of the said Contract.

Please also be advised that this Letter of Instruction cannot be cancelled without the prior consent from the above named Branch of Malayan Banking Berhad.

Kindly acknowledge receipt of this notice on the duplicate hereof.

Thank you.

Sgd. (Illegible).

Authorised signatory of

BENNES ENGINEERING BHD

We hereby acknowledge receipt of this letter 'subject always that Bennes Engineering Bhd has not defaulted or is in breach of the terms of the agreement date(d) 30th June 1997 and strictly without prejudice to any of our rights under the said Agreement including but not limited to our right of set-off the progress payments against any payments claims and/or damages due to us.'

GIANT CASH & CARRY SDN. BHD.

Sgd. (Illegible).

Director

(Date and Stamp of GIANT

CASH & CARRY SDN. BHD.)"

The first defendant acknowledged and consented to the assignment as reflected in encl. 11 of exhibit "TUH 3" at p. 48 thereof which was worded as follows:

ACKNOWLEDGMENT AND CONSENT

We, GIANT CASH & CARRY SDN. BHD. (Company No. 260116-U) of No. 672 & 673 USJ 1 Subang Jaya, 47500 Petaling Jaya, Selangor Darul Ehsan, do hereby acknowledge that the foregoing Assignment was intimated to us by the delivery of a true copy thereof and the same has been duly noted in our records and we do hereby consent to this Assignment.

We hereby agree and undertake to pay all the progress payments direct to MALAYAN BANKING BERHAD at its branch office at 92, JALAN TUN H.S. LEE, 50000 KUALA LUMPUR for the account of BENNES ENGINEERING BHD account no. 014310309519 as and when the same shall become due and payable in respect of the said Contract.

'Subject always that Bennes Engineering Bhd has not defaulted or is in breach of the terms of the agreement date(d) 30th June 1997 and strictly without prejudice to any of our rights under the said Agreement including but not limited to our right of set-off the progress payment against any payments claims and/or damages due to us.'

Date(d) this 9th day of Sep 1997
Signed by)
GIANT CASH & CARRY SDN. BHD.) GIANT CASH AND
(Company No. 260116-U)) CARRY SDN. BHD.
in the presence of :-) Sgd. (Illegible).
Sgd. (Illegible). Director
LIM SIEW CHYUAN
Financial Controller

The plaintiff was most unhappy and it was the plaintiff's stand that the first defendant's consent to the assignment of the proceeds of the contract to the fourth defendant was a fraud on the plaintiff.

With this background scenario, I will now proceed to examine the arguments advanced by the parties.

Arguments By The Parties In Regard To The First Defendant

Three major issues were raised. For convenience, I shall dwell on each issue, one at a time.

(1) No Privity Of Contract

It was argued that there was an absence of a contractual relationship between the plaintiff and the first defendant. It was submitted that the plaintiff was employed by the second defendant. Relying on cl. 27(a) of the contract between the first defendant and the second defendant, it was submitted that although the first defendant had to approve and nominate the plaintiff as a nominated subcontractor, yet the plaintiff was employed by the second defendant. Reliance was placed on the case of *Joo Yee Construction Pte Ltd (In Liquidation) v. Diethelm Industries Pte Ltd & Ors* [1990] 2 MLJ 66, a decision of the High Court of Singapore. It was a decision of a foreign country. In that case the plaintiff – *Joo Yee Construction Pte Ltd*, had on 12 September 1986 entered into a building contract with the government of Singapore for the construction of the blood transfusion services/department of scientific services complex at the General Hospital, Singapore. The government of Singapore appointed International Development and Consultancy Corp Pte Ltd ("Indeco") as the agent for the purpose of administering the building contract. Under the building contract, Indeco was appointed as the superintending officer. The first, second, third and fourth defendants were appointed as the nominated subcontractors for the development of the project. Each of the four defendants as the nominated subcontractor had, on different dates, entered into a subcontract with the plaintiff and the terms of each of the

subcontract was identical in all material respects. On 10 February 1989, a winding up order was made against the plaintiff. The High Court of Singapore had to consider the issue of whether any direct payment to be made by the government of Singapore to the nominated subcontractors pursuant to cl. 20(e) of the building contract contravened the combined operations of ss. 280(1) and 327(2) of the Companies Act (Cap. 50, 1988 edn). Thean J. at p. 71 of the report said:

> First, the government is under no obligation to make any payment at all to any of the nominated sub-contractors, and there is no privity of contract in any way between the government and any of them. It may elect to make payment under clause 20(e), if it so wishes. Secondly, if it does make payment of any sum thereunder to a nominated sub-contractor, that sum is one that is actually due from the plaintiff, and not from the government, to the nominated sub-contractor.

Continuing at p. 72 of the report, Thean J said:

> I am unable to accept this argument. It ignores fundamentally the contractual relationship between the government and the plaintiff and that between the plaintiff and the sub-contractors. The main contract was made between the government and the plaintiff. All the work to be carried out and materials and goods to be supplied under the main contract were to be carried out and supplied by the plaintiff or caused and procured to be done by it, and, correspondingly, all moneys to be paid for such works done and materials and goods supplied were and are payable to the plaintiff under the main contract. Any payment of such moneys to persons other than the plaintiff can only be made with the consent or on the authority of the plaintiff, and cl. 20(e) of the main contract operates as an authority from the plaintiff to the government to effect such payment direct to the nominated sub-contractors. It follows that whatever sums of money the government elects to pay to the nominated sub-contractors under cl. 20(e) are moneys which would otherwise be paid to the plaintiff. As between the government and the plaintiff, they are in fact moneys payable or to be payable by the government to the plaintiff. Once they are paid to the plaintiff, the latter becomes obliged to pay them to the nominated sub-contractors. But because the plaintiff had defaulted in respect of past payments to the nominated sub-contractors, the government is under cl 20(e) entitled to exercise the authority and pay the moneys direct to the nominated sub-contractors, and if it does so elect and make the payment it then deducts those payments from sums payable to the plaintiff. These moneys paid to nominated sub-contractors and subsequently deducted from sums payable to the plaintiff are, in effect, moneys payable to the plaintiff; they represent the plaintiffs' entitlement under the main contract.

On the issue of trust, Thean J. had this to say at p. 74 of the report:

> Lastly, counsel for the fifth defendant submitted that moneys due to the nominated sub-contractors do not belong to the plaintiff in any event but held on trust for them. I do not see how such a trust can arise. There is clearly lacking in the subject matter of the trust; there is not in the hands of the government any fund in respect of which a trust can be implied in law for the benefit of the nominated sub-contractors. The government is not holdings, nor has it earmarked, any fund for the specific purpose of making payment to the sub-contractors. It may be, and probably it is, under an obligation to make payments under the main contract; but such obligatory payments are to be made to the plaintiff. The government is under no obligation to make any payment to the sub-contractors under cl. 20(e); it may elect to do so, if it wishes. If it does not elect to do so, the sub-contractors have no claim against it whatsoever. The cases of *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567 and *Toovey v. Milne* [1819] 2 B & A 683; 106 ER 514 are wholly irrelevant and are of no assistance here.

Reliance was also made on the passage appearing in the judgment of Lim Beng Choon J. in *Royden (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33 where his Lordship said at p. 39 of the report:

> It must therefore be borne in mind that the general rule under the common law is that there is no privity of contract between the employer and the sub-contractor (see for instance *Hampton v. Glamorgan CC* [1917] AC 13).

and applying these two authorities, it was vigorously argued that there was no privity of contract between the plaintiff and the first defendant. Indeed that was an attractive argument.

Reliance was also placed on cl. 27(f) of the contract between the first defendant and the second defendant where under that clause, there was an express exclusion of the liability of the first defendant to any nominated subcontractor. It was the stand of the first defendant that the plaintiff knew the terms and conditions of the contract between the first defendant and the second defendant because the letter of award as reflected in exhibit "SSH 1" of encl. 2 which was reproduced earlier made specific reference to the fact that the subcontract between the plaintiff and the second defendant was subject to the conditions in the main contract. It was submitted that since the first defendant was not a party to the subcontract between the plaintiff and the second defendant, then this meant that the first defendant could not have practised fraud on the plaintiff.

It was pointed out that the second defendant awarded the subcontract to the plaintiff subsequent to its assignment of the proceeds to the fourth defendant. It was also pointed out that the second defendant had been

paying the plaintiff all its progress claims except the present claim and yet there was no allegation that the first defendant was committing any fraud on the plaintiff then. An argument was fashioned to the effect that the allegations of fraud as pleaded by the plaintiff could not be maintained. It was argued that there was no evidence that the first defendant had acted fraudulently against the plaintiff. There was also no evidence, so the submission went, that the first defendant was a party to any fraud. Incidentally, a trial would be the best forum to adjudicate upon the issue of fraud where evidence will be led and tested by way of cross-examination.

In regard to the assignment of the proceeds of the contract, it was nothing new. It was a common feature in the construction industry and well known to the plaintiff. To finance its contract, the second defendant as the main contractor obtained banking facilities from the bank – the fourth defendant, and as security the second defendant assigned the proceeds of its contract to the fourth defendant. There was nothing sinister, nor fraudulent, nor deceitful in this kind of financial arrangement. It was submitted that the first defendant was not a party to the financial arrangement which was essentially an affair between the second defendant and the fourth defendant. As an employer, the first defendant had notice of the assignment of the proceeds of the contract and the first defendant's consent to the assignment had been obtained.

It was submitted that the allegations of fraud by the first defendant was totally baseless and unfounded. It seemed that the plaintiff was blowing hot and cold. When the plaintiff received its payment, no allegation of fraud was hurled at the first defendant. But when the plaintiff did not receive its payment, the allegation of fraud was conveniently hatched so as to taint the whole transaction. The dispute was essentially between the plaintiff and the second defendant. Pure and simple, it was a claim for a debt owing by the second defendant to the plaintiff and, unfortunately, the first defendant was dragged into the foray.

(2) Deed Of Assignment

The first defendant was certainly bound by the deed of assignment to pay the proceeds to the fourth defendant. The deed of assignment was still subsisting and any payment made otherwise than in accordance to the terms of the assignment would render the first defendant liable to the fourth defendant. Section 4(3) of the Civil Law Act, 1956 would certainly shackle the first defendant to the deed of assignment. It was rightly submitted that in the event this court was to grant the injunction in terms of prayer (i) of encl. 3, it would cause hardship to the first defendant. The granting of

prayer (i) of encl. 3 would cause the first defendant to commit a breach of the terms of the deed of assignment and this court would certainly not condone it. This was my judgment and I so hold accordingly.

(3) Trustees Of The Monies

It was contended that the monies due to the plaintiff under the contract was held in trust for the plaintiff. But alas, the details of that trust were not particularised. It was unclear as to how the trust came into being. There was also no fiduciary relationship between the first defendant and the plaintiff. In regard to the issue of trust, the passages of the judgment of Thean J. in *Joo Yee Consortium Pte Ltd (In Liquidation) v. Diethelm Industries Pte Ltd & Ors (supra)* as reproduced earlier, particularly at p. 74 of the report, must be vigorously applied to the detriment of the plaintiff.

According to Field J. in *Plowright v. Lambert* [1885] 52 LT 646 at 652, a trustee holds the property in a fiduciary capacity and the trustee stands in a fiduciary relationship to the beneficiary. Lord Selborne in *Barnes v. Addy* [1874] 9 Ch App 244 at 251 adopted the same principle and approach as Field J. in *Plowright v. Lambert (supra).*

Part IV of the Trustee Act, 1949 (Act 208) relates to the appointment and discharge of trustees. Section 39 of the Trustee Act, 1949 (Act 208) limits the number of trustees to four. Section 40 of the Trustee Act, 1949 (Act 208) talks about the power of appointing new or additional trustees. While ss. 41, 42, 43 and 44 of the Trustee Act, 1949 (Act 208) were in regard to supplemental provisions as to the appointment of trustees, evidence as to a vacancy in a trust, retirement of trustee without a new appointment and in regard to the vesting of trust property in new or continuing trustees respectively. Section 3(1) of the Trustee Act, 1949 (Act 208) defines a "trust" in this way:

> 'trust' does not include the duties of chargee, but with this exception the expressions `trust' and `trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative and `trustee', where the context admits, includes a personal representative, and `new trustee' includes an additional trustee;

Part III of the Trustee Act, 1949 (Act 208) sets out the general powers of trustees and personal representatives and these powers are certainly wide and all encompassing. In order to put into motion the Trustee Act, 1949 (Act 208), the plaintiff must show to this court how the trust came

into existence. It is indeed onerous to be a trustee and this is clearly borne out in s. 63 of the Trustee Act, 1949 (Act 208) which enacts as follows:

> If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same.

Notwithstanding the fact that a trustee stands in a fiduciary relationship to the beneficiary, the latter must not instigate, in whatever manner, the trustee to commit a breach of trust. Section 64 of the Trustee Act, 1949 (Act 208) in a strong term enacts as follows:

> (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.
>
> (2) This section applies to breaches of trust committed as well as before as after the commencement of this Act.

Be that as it may, s. 2(2) of the Trustee Act, 1949 (Act 208) enacts as follows:

> The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.

and the germane question to pose would be: was there an instrument that created the trust in the present case? The answer would be in the negative. The following cases like *Riddle v. Emerson* [1682] 1 Vern 108; *Willis v. Willis* [1740] 2 Atk 71; *Adlington v. Cann* [1744] 3 Atk 141; *Leman v. Whitley* [1828] 4 Russ 423; *De Biel v. Thomson* [1841] 3 Beav 469; *Tierney v. Wood* [1854] 19 Beav 330; *Kronheim v. Johnson* [1877] 7 Ch D 60; *Dye v. Dye* [1884] 13 QBD 147, C.A.; and *Re Cozens, Green v. Brisley* [1913] 2 Ch 478 all lay down a singular principle of law that is worth repeating. It is this. That a declaration of trust in respect of any land or in respect of any interest must be manifested and proved in writing.

According to Grant MR in *Randall v. Morgan* [1805] 12 Ves 67 at 74 it would be sufficient at some later stage that there was some writing which would constitute evidence of the fact of the trust. But, unfortunately, in the present case, there was no instrument nor writing to manifest the existence of the trust. This was my judgment and I so hold accordingly.

Arguments By The Parties In Regard To The Second Defendant

In so far as the second defendant was concerned, the injunction which the plaintiff sought had the effect of prohibiting the second defendant from receiving and the first defendant from paying the sums due under the statement of final accounts allegedly due to the plaintiff. It was submitted on behalf of the second defendant, that the plaintiff's application in encl. 3 was misconceived because it had not taken into account the payments that had already been made to the plaintiff and the set-offs that the second defendant was entitled to make against the plaintiff. It was pointed out that at the time of filing encl. 3, the quantum that was allegedly due to the plaintiff under the final account was neither accepted by the plaintiff nor ascertained or determined by the quantity surveyor nor certified by the architect. Of significance to note would be the fact that the plaintiff had not signed the statement of final account that was forwarded to them. In the plaintiff's affidavits, three different figures were bandied about, namely, the sums of RM5,066,615.50, RM5,069,615,50 and RM5,032,565.50. This showed that the plaintiff was not even certain as to the correct figure that was allegedly owed to them.

It must be borne in mind that under the contract, payment was only due to the plaintiff within 14 days after the architect's certification. But since the plaintiff did not sign the statement of final account then no payment under the final account was due to the plaintiff and, arising out of this, it was certainly an exercise in futility for the plaintiff to institute its claim for the simple reason that that claim was premature. That being the case, the balance of convenience of the plaintiff's application was clearly in favour of the second defendant, and I so hold accordingly.

In regard to the sum of RM146,050.50 that arose out of the architect's interim certificate no: 13 which the plaintiff said was due to them, the second defendant's stand was quite simple: that sum was the subject of the second defendant's counterclaim. That counterclaim arose from the second defendant's contractual rights under cl. 6 of the sub-contract. Reverting back to the issue of set-offs, it was the second defendant's stand that the set-off should be activated in favour of the second defendant. The decision of the Supreme Court in *Pembinaan Leow Tuck Chui & Sons*

Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 was correctly used as a leverage to enhance the second defendant's submission. In that case, Edgar Joseph Jr. FCJ (as he then was) at p. 78 of the report had this to say:

> In our view, therefore, the express enumeration of permitted set-offs in a contract or sub-contract, can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as (falling) strictly within the scope of the permitted set-offs, and nothing else, on the basis of the *expressio unius* principle.
>
> In the present case, there are seven express provisions in the contract to which we have referred whereby the employer has the right of set-off but none of them is relevant to its alleged right to make the set-off for which it contends.
>
> In our view, regard being had to these provisions of the contract, and applying the *expressio unius* principle, so far as claims for payment on certificates are concerned, the ordinary common law right of set-off had, in the words of Lord Salmon in the *Gilbert-Ash case* [1974] AC 689 at pp. 722-723; [1973] 3 All ER 195 at p 220; [1973] 3 WLR 421 at p 448) quoted above, been extinguished, not expressly but by clear implication.

That was not the end of the matter. It would be apparent from a perusal of encl. 22, exhibit marked "LHS 2" thereof that the first defendant had withdrawn in writing the LAD to the tune of RM330,000 on June 1, 1999 and had yet to return the said sum to the second defendant. The latter took exception to the timing of the said withdrawal. It was submitted that the withdrawal was obviously "to beat the dateline" and orchestrated to prejudice the second defendant at the hearing of encl. 3. Nevertheless, it was argued that notwithstanding the withdrawal of the LAD by the first defendant, the second defendant was not precluded from setting-off against the plaintiff for all the losses and damages occasioned by the plaintiff's breaches. It was further argued that the first defendant's imposition of the LAD was merely part of the damages suffered by the second defendant by reason of the plaintiff's breaches. Statutory wise, s. 74(1) of the Contracts Act, 1950 enacts as follows:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

and this would be followed by s. 75 of the Contracts Act, 1950 which is worded in this fashion:

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation – A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception – When any person enters into any bail-bond, recognisance, or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Federal Government or the Government of any State, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation – A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

ILLUSTRATIONS

(a) **A** contracts with **B** to pay **B** $1,000, if he fails to pay **B** $500 on a given day. **A** fails to pay **B** $500 on that day, B is entitled to recover from A such compensation, not exceeding $1,000, as the court considers reasonable.

(b) **A** contracts with **B** that, if **A** practises as a surgeon within Calcutta, he will pay **B** $5,000. **A** practises as a surgeon in Calcutta. **B** is entitled to such compensation, not exceeding $50,000 as the court considers reasonable.

(c) **A** given a recognisance binding him in a penalty of $500 to appear in court on a certain day. He forfeits his recognisance. He is liable to pay the whole penalty.

(d) **A** gives **B** a bond for the repayment of $1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and **B** is only entitled to recover from **A** such compensation as the court considers reasonable.

(e) **A** who owes money to **B**, a moneylender, undertakes to repay him by delivering to him 10 gantangs of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 gantangs. This is a stipulation by way of penalty, and **B** is only entitled to reasonable compensation in case of breach.

(f) **A** undertakes to repay **B** a loan of $1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

> (g) **A** borrows $100 from **B** and gives him a bond for $200 payable by five yearly instalments of $40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

It would appear that the differences between liquidated damages and penalties have been removed totally by the existence of s. 75 of the Contracts Act, 1950. The court would only be concerned to determine the reasonable compensation that should be due. The phrase "reasonable compensation" brings into sharp focus the case of *Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd* [1915] AC 79 where the court was able to quantify the damage at a fixed rate but not at an extravagant rate. But it must be emphasised that under s. 75 of the Contracts Act, 1950 the award by the court of a reasonable sum cannot exceed "the amount so named or, as the case may be, the penalty stipulated for." The phrase "whether or not actual damage or loss is proved to have been caused thereby" in s. 75 of the Contracts Act, 1950 must necessarily mean that there is no need to prove the "actual damage" suffered because the "actual damage" will manifest itself in the "reasonable compensation" which the court will order after listening to the evidence. Evidence will have to be led. In a situation where the evidence of "actual damage or loss" is not available, the court will then proceed cautiously and will in its best endeavour ascertain the reasonable compensation that would be due to the plaintiff. This seems to be the approach adopted in the case of *Mool Chand Behari Lal v. SD Chand & Co AIR* (34) 1947 Lahore 112 where at 116, the court said:

> In cases where there is no data to estimate the amount of damages actually caused, the discretion of the court is unfettered in allowing what it considers `reasonable compensation', subject, of course, to the maximum fixed by the parties.

Then there is the case of *State of Kerala v. M/S United Shippers and Dredgers Ltd AIR* [1982] Kerala 281 where the court aptly said:

> He (referring to the plaintiff) need not prove in an exact manner the extent of the real loss or damage suffered by him or the loss or damage suffered by him in fact. However, if he proves it, that will certainly help the court to arrive at the proper compensation. Even if he fails to prove it, the court cannot throw out his case on that ground, but must proceed to assess reasonable compensation which is to be awarded to him, on the materials before the court and subject to the limit of the amount stipulated in the contract.

Damages will always be governed by the concept of mitigation. Even though s. 74 (1) of the Contracts Act, 1950 speaks of compensation for loss or damage caused by breach of contract, yet the Explanation thereto brings into sharp focus the principle of mitigation. That Explanation to s. 74 of the Contracts Act, 1950 enacts as follows:

> *Explanation* – In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

An excellent exposition of the principle of mitigation was propounded by Mohamed Dzaiddin SCJ in *Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd* [1994] 3 MLJ 569, [1994] 3 AMR 2407. Thompson LP in *Pasuma Pharmacal Corp v. McAlister & Co Ltd* [1965] 1 MLJ 221 at 227-228 said:

> It is, however, well-settled law that a person who suffers from a breach of contract is bound to do all that a reasonable and prudent man would do in the circumstances to mitigate his loss.

To paraphrase s. 74 (1) of the Contracts Act, 1950 it states that the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation which naturally arose in the usual course of events from the breach or which the parties knew that when they made the contract, it would likely result in the breach thereof. And when read with s. 75 of the Contracts Act, 1950 it meant that the second defendant was entitled to set-off against the plaintiff in relation to the LAD that had been imposed. The second defendant was also entitled to rely on s. 74 (2) of the Contracts Act, 1950 which states that:

> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

and this meant that the second defendant could claim from the plaintiff whatever damages suffered if the first defendant were to impose LAD by reason of the plaintiff's breaches. It must be borne in mind that the plaintiff clearly had notice that there will be an imposition of LAD if the overall works were delayed by the plaintiff's breaches.

Allegations Of Fraud By The Plaintiff Against The Second Defendant

The plaintiff submitted that the second defendant had committed fraud when all the payments from the first defendant had been assigned to the fourth defendant by the second defendant. At first blush, the submission appeared attractive. But one must take stock of the situation and recite the salient facts once again. Thus, the evidence would show that:

(1) On 8 September 1997, the deed of assignment came into existence; and

(2) On 7 October 1997, the plaintiff became the nominated subcontractor of the second defendant.

This meant that the deed of assignment was executed even before the plaintiff was appointed as the nominated subcontractor of the second defendant. That being the case, it was clearly erroneous to say, as the plaintiff had said, that the second defendant had the intention to commit fraud against the plaintiff. It would be interesting to note that notwithstanding the deed of assignment, payments were in fact made by the second defendant to the plaintiff. There was no denial that payments have been received by the plaintiff from time to time and such payments were made throughout the contractual period between the plaintiff and the second defendant. It can be surmised that the deed of assignment can never constitute a fraud by the second defendant against the plaintiff. The allegation of fraud carries with it a higher burden of proof. As Raja Azlan Shah J. (as His Majesty then was) in *Lau Kee Ko & Anor v. Paw Ngi Siu* [1974] 1 MLJ 21 speaking for the Federal Court said at p. 23 of the report:

> It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.

In *Lee You Sin v. Chong Ngo Khoon* [1982] 2 MLJ 15, Lee Hun Hoe C.J. (Borneo) said that in the context of an allegation of fraud a higher burden of proof was required than what was normal in a civil case. Lamin PCA in *Southern Estate Sdn Bhd & Anor v. Tractors Malaysia Bhd* [1996] 3 MLJ 453 while delivering the judgment of the Court of Appeal aptly said at p. 459 of the report:

> In Malaysia, the standard of proof required to prove fraud is well-settled as illustrated in the case of *Saminathan v. Pappa* [1981] 1 MLJ 121.

and that would be beyond reasonable doubt.

Was The Second Defendant A Trustee Of The Plaintiff?

The existing relationship between the plaintiff and the second defendant was strictly contractual in nature. If at all the plaintiff had a valid claim against the second defendant, that claim was only against the second defendant as a debtor. From the available evidence, the second defendant was not a trustee to the plaintiff. This was certainly part and parcel of my judgment.

Arguments By The Parties In Regard To The Third Defendant

As alluded to earlier, the third defendant was a mere architect of the Giant hypermarket. The third defendant was employed by the first defendant. The duties of the third defendant as an architect and the obligations that flowed under it can readily be seen in exhibit "TUH 1" of encl. 11. According to the case of *Sutcliffe v. Thackrah And Others* [1974] 2 WLR 295, the architect has got certain roles to play. Lord Reid described the position of the architect in that case in these fine words (see p. 299 of the report):

> Now I can come to the position of an architect. He is employed by the building owner but has no contract with the contractor. We do not in this case have occasion to consider whether nevertheless he may have some duty to the contractor: I do not think that a consideration of that matter would help in the present case. The R.I.B.A. form of contract sets out the architect's functions in great detail. It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.
>
> Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the R.I.B.A. contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance) or clause 34 (antiquities); whether he should be allowed extra time (clause 23); or where work ought reasonably have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect.
>
> The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor.

It would be correct to say that the duty of the architect is to issue certificate and certify whether the contractor has met its contractual obligation so as to entitle the contractor to receive interim payments during the progress of the works. In discharging its duty, the architect must be seen to be impartial and must act fairly and professionally when exercising its independent judgment. If the architect fails to fulfil these requirements, the aggrieved party may challenge the decision of the architect.

Professor Vincent Powell-Smith in his book entitled "The Malaysian Standard Form of Building Contract (PAM/ISM 69)", 1990 edition said at p. 131:

> Clause 27(b) to (f) set out some of the obligations of the employer and the contractor when a sub-contractor has been nominated by the architect.
>
> Clause 27(b) deals with the valuation and inclusion in certificates of sums in respect of the work of nominated sub-contractors. In any certificate issued under clause 30, the architect must inform the contractor what figure of 'total value' in respect of the nominated work, materials or goods is included in the sum certified. He must also inform the nominated sub-contractor in writing of that 'total value' included in the certificate. The contractor's obligation is to pay that 'total value' to the nominated sub-contractor within 14 days of receipt of the certificate less:
>
> (1) retention as provided in the sub-contract;
>
> (2) 'any sum to which [he] may be entitled in respect of delay in completion of the sub-contract Works or any section thereof'.
>
> Reference should be made to clause 27(d)(ii) as to the importance of the architect's certificate of delay which is a condition precedent to this deduction being made.
>
> The terms of the sub-contract as to the exercise of any right of set-offs must be complied with, but there is no special rule applicable to the PAM contract which excludes any right of set-off which the contractor may possess: *Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195; *Mottram Consultants Ltd v. Bernard Sunley & Sons Ltd* [1975] LIR 197.
>
> It may seem strange that the deductions which clause 27(b) permits the contractor to make do not include 'sums previously paid'. Such sums will, of course, be taken into account and deducted and the sub-contract will provide for that deduction.
>
> The period of grace for the contractor to pay over the sum due to the nominated sub-contractor is 14 days from receipt of the architect's certificate. Under clause 30(1) the period of grace which the employer has is 14 days from presentation of the certificate by the contractor, unless a different period is inserted in the Appendix.

Continuing at p. 132 to p. 133 of the same book, the learned author had this to say:

> Clause 27(c) makes limited provision for direct payment to the nominated sub-contractor by the employer of amounts previously certified but not paid by the contractor. Before issuing any certificate under clause 30, the architect may (not must) require the contractor to provide him with 'reasonable proof' that amounts for payment to nominated sub-contractors included in previous certificates have

been paid. If the contractor does not provide that 'reasonable proof', eg a receipt, the architect must issue a certificate to that effect, and the employer may then pay the nominated sub-contractors direct. If he does make direct payment, he may recover the sums so paid by deducting them from amounts certified as due to the contractor.

The application of a similar provision in an earlier English version of the form in the event of the contractor becoming insolvent was considered in *Re Tout and Finch Ltd* [1954] 1 All ER 127 and its effectiveness against the contractor's liquidator was upheld. It is thought that the decision applies to the revised wording.

Clause 27(d) deals with delay in the completion of the sub-contract works by the nominated sub-contractor and the circumstances in which the contractor may grant an extension of time to the nominated sub-contractor.

Paragraph (i) provides that the contractor 'shall not grant' any extension of time to a nominated sub-contractor without the written consent of the architect, which must not be unreasonably withheld. That consent is a condition precedent to the granting of an extension of time, and this requirement must be stepped-down in the sub-contract. The contractor must inform the architect of any representations which the sub-contractor has made to him about the cause of any delay. Exact observance of these provisions is essential.

Paragraph (ii) is badly phrased and the nature of the architect's certificates under this clause is widely misunderstood. It requires the architect to certify his opinion that the sub-contractor ought reasonably to have completed his work or the relevant section within whatever period was stated in the sub-contract or is applicable following the grant of any extension of time by the main contractor. It should not state what the period is, nor should it state the date by which, in the architect's opinion, the work should have been completed A duplicate of the cl. 27(d)(ii) certificate must be sent to the sub-contractor. This certificate is a condition precedent to the contractor deducting 'any sum to which [he] may be entitled in respect of delay in completion' under cl. 27(b).

Clause 27(e) provides the machinery whereby the architect can secure early final payment to a nominated sub-contractor. Early final payment is not mandatory. If the architect wishes to ensure final payment to a nominated sub-contractor before issuing the final certificate he may include its amount in an interim certificate, but only 'if such sub-contractor has satisfactorily indemnified the Contractor against any latent defects' in the sub-contract works, for which the contractor remains responsible. The contractor is then bound to pay the nominated sub-contractor the amount certified, which will include any retention attributable to the sub-contract works. When the final payment is made, there will be a proportionate reduction in the amount of the retention held.

Finally, at p. 133 of the same book, the learned author had this to say:

> Clause 27(f) refers to the fact that there is no privity of contract between the employer and the nominated sub-contractor. 'Neither the existence nor the exercise of any of the foregoing powers nor anything else contained in these conditions shall render the employer in any way liable to any nominated sub-contractor'.

All these passages serve as useful guidelines in adjudicating encl. 3 and they will certainly be applied vigorously. *Certum est quod certum reddi potest* – that is certain which can be rendered certain.

The Plaintiff's Claim Against The Third Defendant

Now, in so far as the plaintiff's claim against the third defendant was concerned, I have this to say. The plaintiff stand was quite simple. The plaintiff said that the third defendant, as the architect, had breached its duties and as a result of which the plaintiff had suffered loss and damage. At para. 17 of the statement of claim in encl. 1 equivalent to para. 17 of the amended statement of claim in encl. 39, the plaintiffs listed the particulars of the breach of duty on the part of the third defendant in these words:

> (i) failing to act on the complaint of the plaintiff that the second defendant has defaulted in the payment of the 13th interim certificate;
>
> (ii) failing to request the second defendant to furnish reasonable proof that all amounts stated as due and included in the previous certificates in respect of the total value of works executed, material or goods supplied by the plaintiff have been discharged;
>
> (iii) failing to issue a certificate that the sum of RM146,050.00 to the plaintiff under the 13th interim certificate has not been made by the second defendant to the plaintiff which would have enabled the first defendant to pay the said sum directly to the plaintiff;
>
> (iv) failing to ensure that no deductions shall be made for alleged LAD charges from interim payments.

But it must not be forgotten that in relation to paras. 17(i) and (ii) of the statement of claim the third defendant had completed its task and this can be seen in two letters exhibited in encl. 13. The first letter marked as "SCFI" dated 24 May 1999 as seen in encl. 13 and the second letter dated 2 June 1999 as seen in exhibit "SCF 2" of encl. 13. I will now reproduce these two letters in succession. The first letter was worded as follows:

REGIONAL DEVELOPMENT CONSORTIUM
24TH May 1999
Bennes Engineering Berhad
No. 50, Jalan 10/116B
Kuchai Entrepreneurs Park
Jalan Kuchai Lama
58200 Kuala Lumpur
Attn: Mr. Edward Lee

Dear Sir,

CONSTRUCTION AND COMPLETION OF SUPERSTRUCTURE WORKS FOR CADANGAN MEMBINA SEBUAH PASARAYA (HYPERMARKET) DI ATAS LOT PTD 116058 & 116059 MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM

We enclosed herewith a self explanatory letter from Ong Yoke Lin Sdn. Bhd., dated April 26, 1999. In view of the payment issue which is outstanding to Ong Yoke Lin Sdn Bhd, please explain and show cause to us why payment on Interim Certificate No. 13 was not paid to them.
We would highlight to you that there is a provision in Clause 27(c) of the PAM Contract which relates to non payment to nominated sub-contractor. We would exercise this clause if the problem remains unresolved. Please reply to us soonest possible.
Thank you.
Yours faithfully,
REGIONAL DEVELOPMENT CONSORTIUM
Arkitek
Sgd. (Illegible).
C.F. SIOW

c.c. Giant Cash & Carry Sdn. Bhd.	-	Mr. Francis Teng
	-	Mr. B.H. Lim
JUB Padu Sdn. Bhd	-	Mr. K.T. Lee
Norman Disney & Young Sdn. Bhd.	-	Mr. C.H. Tey
Ong Yoke Lin Sdn. Bhd.	-	Mr. T.V. Chong

and the second letter was couched in this manner:

REGIONAL DEVELOPMENT CONSORTIUM
Arkitek
2nd June 1999
Bennes Engineering Berhad
No. 50, Jalan 10/116B
Kuchai Entrepreneurs Park
Jalan Kuchai Lama
58200 Kuala Lumpur
Attn: Mr. Edward Lee

Dear Sir,

CONSTRUCTION AND COMPLETION OF SUPERSTRUCTURE WORKS FOR CADANGAN MEMBINA SEBUAH PASARAYA (HYPERMARKET) DI ATAS LOT PTD 116058 & 116059 MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM

- Non payment to Nominated Sub-Contractor On Interim Certificate No: 13

Our letter reference no.GCC/M9617/BEB/96 (151) dated May 24, 1999 to you referred.

Until to date, you have failed to explain and show cause to us why payment on Interim Certificate No.: 13 to Ong Yoke Lin Sdn. Bhd. was not paid. This letter serves to remind you that we will take appropriate action as per PAM Contract. Thank you.

Yours faithfully,
REGIONAL DEVELOPMENT CONSORTIUM
Arkitek

Sgd. (Illegible).
C.F. SIOW

c.c. Giant Cash & Carry Sdn. Bhd.	-	Mr. Francis Teng
	-	Mr. B.K. Lim
JUB Padu Sdn. Bhd.	-	Mr. K.T. Lee
Norman Disney & Young Sdn. Bhd.	-	Mr. C.H. Tey
Ong Yoke Lin Sdn. Bhd.	-	Mr. T.V. Chong

In regard to para. 17(iii) of the statement of claim, the third defendant responded by letter dated 8 June 1999 as seen in exhibit "SCF 3" of encl. 13 which clearly showed that the certificate under cl. 27(c) of the contract had been issued and that letter was worded in this way:

REGIONAL DEVELOPMENT CONSORTIUM
Arkitek

8th June 1999
Giant Cash & Carry Sdn. Bhd.
Lot 116058 & 116059
Jalan Masai Lama, Mkm. Plentong
81750 Johor Bahru
Johor Darul Takzim
Attn: Mr. Francis Teng

Dear Sir,

CONSTRUCTION AND COMPLETION OF SUPERSTRUCTURE WORKS FOR CADANGAN MEMBINA SEBUAH PASARAYA (HYPERMARKET) DI ATAS LOT PTD 116058 & 116059 MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM
- Clause 27 (C) PAM Contract

We enclose herewith two self explanatory letters to Bennes Engineering Berhad reference: GCC/M9617/BEB/96 (151) dated 24th May 1999 and GCC/M9617/BEB/96 (153) dated 2nd June 1999 respectively.
Until to date, they have failed to reply to us and have also failed to pay amount due on Interim Certificate of Payment No. 13 to their nominated sub-contractor M/s Ong Yoke Lin Sdn. Bhd. In view of this, we are recommending that Clause 27 (C) of PAM contract be exercised. Clause 27 (C) makes limited provision for direct payment to the nominated sub-contractor by the employer of amounts previously certified, but not paid by the contractor. Such amounts can only be effected and deducted from the amount stated as due in the next interim certificate.
Thank you.
Yours faithfully,
REGIONAL DEVELOPMENT CONSORTIUM
Arkitek
Sgd. (Illegible).
C.F. SIOW
c.c.JUB Padu Sdn. Bhd. - Mr. K.T. Lee
Norman Disney & Young Sdn. Bhd. - Mr. C. H. Tey
Ong Yoke Lin Sdn. Bhd. - Mr. T.V. Chong

In regard to para. 17(iv) of the statement of claim, it was not the third defendant's duty to carry out such duty and, consequently, there was no breach occasioned by the third defendant. As an architect, the third defendant's duty under cl. 22 of the contract was simply to certify in writing that in its opinion the works have reasonably been completed within a certain time frame. The question of deducting the LAD rest solely with the employer – the first defendant, and according to paras. 11 and 12 of encl. 11, the first defendant had waived its claim for LAD.

In a nutshell, the plaintiff's claim in encl. 3 was to compel the third defendant to perform the duties which the plaintiff alleged that the third defendant had failed to perform. The injunction that was sought was in the nature of a perpetual injunction. From the available evidence in encl. 13, the third defendant had performed what the plaintiff now sought the third defendant to perform. To accede to encl. 3 in favour of the plaintiff would simply mean that the plaintiff be given judgment without trial. I am reminded of the sage words of Syed Agil Barakbah SCJ in *Tinta Press*

Sdn Bhd v. Bank Islam Malaysia Bhd [1987] 2 MLJ 192 where his Lordship said that the discretion to grant an interlocutory mandatory injunction must be exercised only in exceptional and extremely rare cases. At p. 193 to p. 194, this was what his Lordship said:

> The discovery power of the Court to grant a mandatory injunction is provided by section 53 of the Specific Relief Act, 1950 (Act 137). By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 M.L.J. 109 and confirmed by the Federal Court in *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 M.L.J. 150. The case must be unusually strong and clear in that the Court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result. (See *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] 1 M.L.J. 271, 273 and Shepherd Homes Ltd. v. Sandham [1971] 1 Ch. 340, 349. Where the case is one of urgency, Order 29 rule 1 (2) R.H.C. 1980 allows an application to be made ex parte. We are satisfied that the learned Judge on the facts and surrounding circumstances of this case rightly concluded that this was an exceptional case where the Court was justified in granting a mandatory injunction on an ex parte application before the trial.

Abdoolcader J. in *Gibb & Co. v. Malaysia Building Society Bhd* [1982] 1 MLJ 271 in style said at page 273 of the report:

> Before we deal with the issues raised we should perhaps touch on a point made by Mr. Sri Ram for the appellant in referring to the judgment of this court in *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 M.L.J. 150 which, referring to a pronouncement to that effect in *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 M.L.J. 109, 114, restates inter alia that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. That statement of the law is correct as an interlocutory application for a mandatory injunction is a very exceptional form of relief (*Canadian Pacific Railway v. Gaud* [1949] 2 K.B. 239, 249), but there is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the court has jurisdictions to so order. Fry L.J., said in *Bonner v. Great Western Railway Company* (1883) 24 Ch. D. 1, 10: `I have no doubt of the jurisdiction of the court to grant a mandatory injunction on interlocutory applications as well as the hearing.' The case however must be `unusually sharp and clear' (*Shepherd v. Sandham* [1971] Ch. 340), and the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend inter alia upon considerations of hardship to the parties. In deciding the manner of interlocutory injunction that should be granted courts

of equity will consider how the interests of the parties may best be protected, bearing in mind both the position of the parties subsequently at the final hearing and also questions of hardship and inconvenience in the meantime, and will take into account any other relevant discretionary considerations which may arise. One of the most important circumstances which will be taken into account by the court is the degree of probability with which it appears to be established that the applicant will ultimately succeed at the final hearing. The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction (*Bonner v. Great Western Railway Company* [1883] 24 Ch. D. 1, 10). Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once (*Strelley v. Pearson* [1880] 15 Ch. D. 113, 117.)

Pausing for a moment, I must vigorously apply these two authorities to the available evidence highlighted in this judgment, and having done so it would be apparent that the plaintiff did not even have a strong case against the third defendant. That being the case, encl. 3 should not be entertained at all.

Arguments By The Parties In Regard To The Fourth Defendant

Prayer (i) of encl. 3 would affect the fourth defendant and in that prayer the plaintiff sought for an injunction restraining the first defendant from paying moneys which were due to the plaintiff under the final account to the second defendant and the fourth defendant.

As a bank, the fourth defendant granted banking facilities to the second defendant which are secured, *inter alia*, by an absolute assignment to the fourth defendant of all moneys payable to the second defendant under the contract. It must be recalled that the plaintiff was the nominated subcontractor of the second defendant for the purpose of supplying the air-conditioning and the mechanical ventilation systems to the Giant hypermarket.

In *Alor Janggus Soon Seng Trading Sdn Bhd & 6 Ors v. Sey Hoe Sdn Bhd & 2 Ors* [1995] 1 CLJ 461, 474, Hj Mohd Jemuri Serjan C.J. (Borneo) laid down the following factors that have to be considered in an application for an interlocutory injunction:

Two prerequisites must be present before Lord Diplock's guidelines can come into play. Firstly, the plaintiffs' case must raise serious issues to be tried. If the plaintiffs fail at that point there clearly is no case for an injunction. Secondly, the trial of the main suit is likely to take place in the sense that the plaintiffs' case shows that they are genuinely concerned to pursue the claim to trial and they are seeking the injunction as a means of holding operation pending the trial. Once it can be established that there are serious issues to be tried then the other guidelines must be invoked. The Court has to consider:

(a) Whether damages are adequate remedy;
(b) Where does the 'balance of convenience' lie;
(c) Are there any 'special factors'.

and I shall now consider these factors in the context of the facts of the present case.

Whether There Are Serious Issues To Be Tried?

I must narrate the facts once again. The plaintiff's claim hinged basically on a claim for moneys due and owing by the second defendant. It involved a sum of RM146,050 as pleaded in the amended statement of claim in encl. 39 particularly at paras. 7 and 8 thereof. At its best, the plaintiff was merely an unsecured creditor of the second defendant.

As alluded to earlier, the fourth defendant granted banking facilities to the second defendant which was secured by the deed of assignment which assigned to the fourth defendant all moneys payable by the first defendant to the second defendant under the contract. That very assignment had been registered under s. 111 (2) of the Companies Act, 1965 and this can readily be seen at exhibit "MBB 2" of encl. 13A. In my judgment, once a certificate under s. 111(2) of the Companies Act, 1965 has been issued that shall be conclusive evidence that the requirements as to registration have been complied with. The rationale for treating the certificate as conclusive is simply to protect the grantee of the charge. Thus, once a certificate is issued the grantee of the charge can safely assume that the charge is validly registered and that registration will not be set aside subsequently by any disgruntled or dissatisfied creditor (*National Provincial and Union Bank of England v. Charnley* [1924] 1 KB 431, 444). A note of warning must be sounded here. The conclusiveness of the certificate relates to the fact of registration. Indeed the court in *Re Lin Securities (Pte)* [1988] 2 MLJ 137 was of the view that the certificate is conclusive only as to the fact that a charge has been duly registered; the certificate is not conclusive as to the validity of the charge and the extent or the property that the charge covers. In other words, the particulars of the charge in the certificate are not conclusive. But the sting of the registration

and the certificate that was issued can never be denied. That certificate was conclusive as to the fact of registration. This meant that the first defendant was legally bound to pay to the fourth defendant the moneys payable to the second defendant under the contract. As an unsecured creditor of the second defendant, the plaintiff had no legitimate claim to the moneys payable by the first defendant to the second defendant under the contract since it had been assigned to the fourth defendant. Of crucial importance to note would be the damning fact that the assignment was created and registered prior to the plaintiff being appointed as the nominated subcontractor of the second defendant. The following factual matrix should stir even the idle mind:

(1) the assignment was created on 9 September 1997 as reflected in enclosure 13A of exhibit "MBB 1";

(2) the assignment was registered on 16 September 1997 as seen in enclosure 13A of exhibit "MBB 2"; and

(2) the plaintiff was appointed as the nominated subcontractor of the second defendant on 7 October 1997 as shown in exhibit "SS H 1" of encl. 2.

For these reasons, the plaintiff cannot be said to have a better right to the moneys which had been assigned to the fourth defendant.

The Status Of The Assignment

I will now proceed to examine an interesting issue and that issue may be phrased in this way: was the assignment absolute or conditional?

The plaintiff was of the view that the assignment was not an absolute assignment. The fourth defendant held an entirely different view and was of the view that it was irrelevant whether or not the assignment was absolute or conditional. It was submitted by the fourth defendant that the difference between an absolute assignment and a conditional assignment was only a matter of procedure. The test to differentiate between an absolute assignment and a conditional assignment can be found at paragraph 19-005 of *Chitty on Contracts,* vol. 1, 27th edn. where the learned author said:

> The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as against the debtor? If so, the assignment will be absolute; but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only. Much may depend on the language of the particular instrument: in construing it, the court

a will look at the whole of the language. The words italicised above are of crucial importance, for it is no concern of the debtor whether the assignor and assignee have some private arrangement for the disposal of the debt after it has been paid by the debtor.

and this very passage was quoted with approval by Augustine Paul J.C. b (now Judge) in *Bank of Commerce (M) Bhd v. Mahajaya Property Sdn Bhd* [1997] 3 CLJ Supp 413, 426. I must now examine the terms of the "loan agreement cum assignment of contract payment" as exhibited in exhibit "TUH 3" of encl. 11 by reproducing certain clauses therein:

c ABSOLUTE ASSIGNMENT

2. For the consideration aforesaid, the Borrower hereby further ASSIGNS ABSOLUTELY UNTO to the Bank all Moneys including the retention sums which may now or hereafter become due and payable to the Borrower under the said Contract and all certificates and documents now in d existence or hereafter to be made which may be necessary for enabling the Bank to recover the said moneys or instalment or part thereof. Provided that notwithstanding the assignment hereinbefore contained or any other provision of this Agreement the Borrower shall and hereby undertakes to observe perform and be bound by all whatsoever conditions covenants and stipulations therein the said Contract on the part of the e Borrower expressed or contained the rights, title, benefits and interests to and in the said Contract thereof but not any of the obligations and liabilities thereunder.

RELEASE AND REASSIGNMENT

3. Upon repayment to the Bank of all moneys owing hereunder together with f all interest thereon and all whatsoever moneys payable by the Borrower under this Agreement the Borrower shall be entitled at its own costs and expenses to obtain a discharge and release of the assignment hereunder in such form as the Bank shall in the circumstances consider appropriate.

POWER OF ATTORNEY

g 5. For the consideration aforesaid the Borrower hereby irrevocably appoints the Bank its servants, agents or any other person(s) nominated by the Bank under the hand of the Manager, Sub-Manager or other officer for the time being of the Bank the attorney of the Borrower for it and in its name or in the name of the attorney or otherwise and on its behalf to enforce all rights and remedies under the said Contract and do all other h things as fully and effectual as the Borrower could do itself in connection therewith and in particular but without prejudice to the generality of the foregoing to collect all such sums of money as are due to the Borrower under the said Contract and to issue good receipts therefor with power for such attorney to substitute and appoint one or more attorneys under him for all or any of the purpose aforesaid as he shall think fit and the i

Borrower hereby agrees and undertakes at all times therefore to ratify and confirm whatsoever the said attorney or attorneys shall lawfully do or cause to be done in and concerning the premises by virtue of this instrument.

EVENTS OF DEFAULT

6. The Bank shall be entitled by notice in writing to the Borrower to demand from the Borrower immediately repayment of all moneys due and payable to the Bank hereunder and interest thereon upon the happening of any of the following events (there is no necessity to itemise the events in detail; suffice for this exercise to refer to them briefly):

(a) Non-payment
(b) Breach of obligations
(c) Misrepresentation
(d) Invalidity
(e) Disposal of Assets
(f) Cessation of Business
(g) Cross-Default
(h) Appointment of Receiver, Legal Process
(i) Insolvency
(j) Suspension of Payments
(k) Composition, Winding-Up
(l) Analogous Proceedings
(m) Legal Proceedings
(n) Judgment Outstanding
(o) Change in Law
(p) Employment
(q) Adverse Events
(r) Non-completion and Termination of the said Contract
(s) Purpose of the said banking facility
(t) Insurance
(u) Revocation of Licence

DEMAND

7. Any demand for payment of the moneys intended to be hereby secured may be made by a notice in writing requiring payment within seven (7) days thereof and may be signed on behalf of the Bank by the Manager, Assistant Manager, Sub-Manager, Accountant or any other Officer of the Bank or by any solicitor or firm of solicitors purporting to act for the Bank and such notice shall be deemed to have been sufficiently served on the Borrower if it is left at the usual or last known place of residence or at the address abovestated of the Borrower or at last usual or last known place of business of the Borrower or sent by registered post or ordinary post to any of such addresses and in the last mentioned case the service shall be deemed to (be) made at the time when the registered or ordinary letter would in the ordinary course of post be delivered.

WAIVER

19. No delay in exercising nor any omission to exercise any right, power or remedy accruing to the Bank upon any default shall affect impair or prejudice any such right, power or remedy or be construed as a waiver thereof or an acquiescence in such default; nor shall any action of the Bank in respect of any default or any acquiescence in such default in any default affect impair or prejudice any right, power or remedy of the Bank in respect of any other or subsequent default.

NOTICES

28. All notices required to be served under this Agreement shall be in writing and shall be sufficiently served on the Bank by being left at its registered offices for the time being and on the Borrower by leaving it at its registered address for the time being or not the address abovestated of the Borrower or at its usual or last known place of business of the Borrower or sent by prepaid registered or ordinary post to any such address and in the last mentioned case service shall be deemed to be made after the expiry of five(5) days from the date of posting and any notice given by the Bank including any notice of demand for moneys loaned or advanced by the Bank to the Borrower may be signed on behalf of the Bank by the Manager, Assistant Manager, Sub-Manager or Accountant or any other officer of the Bank or by any Solicitor (or) firm of solicitors purporting to act on behalf of the Bank.

TIME

46. Time shall be of the essence of this Agreement but no failure or delay on the part of the Bank in exercising nor any omission to exercise any right, power, privilege or remedy accruing to the Bank under this Agreement or any of other security documents shall impair any such right, power, privilege, or remedy or be construed as a waiver thereof or an acquiescence in such default; nor shall any action by the Bank in respect of any default or any acquiescence in any such default, affect or impair any right, power, privilege or remedy of the Bank in respect of any other or subsequent default.

SERVICE OF LEGAL PROCESS

56.(1) Any demand for payment of the moneys covenanted herein to be paid by the Borrower and any notice or request required or permitted to be given or made under this Agreement to the Bank or the Borrower shall be in writing and in the case of the Bank shall be under the hand of any manager or any other authorised officer of the Bank or a solicitor or firm of solicitors purporting to act for the Bank and may be delivered at or sent by prepaid registered post or by facsimile telex telegram or cable to the respective address or addresses specified hereunder or to such other address as shall at the relevant time have been notified by them for that purpose:-

For the Borrower:-
Bennes Engineering Bhd
(Company No. 151934-D)
Lot 271, Jalan Dua
Off Jalan Chan Sow Lin
55200 Kuala Lumpur

For the Bank:-
Malayan Banking Berhad
(Company No. 3813-K)
14th Floor, Menara Maybank
100, Jalan Tun Perak
50050 Kuala Lumpur

(2) Such notices demand or request shall be deemed to be duly served:-
  (a) if it is delivered by hand, at the time of delivery;
  (b) if it is sent by prepaid registered post, five (5) days after posting thereof;
  (c) if it is sent by telegram or cable, on the Business Day next to the date of despatch, or
  (d) if it is sent by facsimile or telex, immediately after transmission thereof if the date of transmission is a Business Day, and if such a date is not a Business Day, then the notice by facsimile or telex shall be deemed to be served immediately on the following Business Day.

(3) No change in the address of service howsoever brought about shall be effective or binding on the Bank unless the Borrower has given to the Bank actual notice of the change of address for service and nothing done in reliance on Clause 55(1) above shall be affected or prejudiced by any subsequent change in the address of service over which the Bank has no actual knowledge of, at the time the act or thing was done or carried out.

EVIDENCE OF INDEBTEDNESS

57. In any proceeding relating to this Agreement a statement as to the amount due to the Bank which is certified as being correct by an officer of the Bank, shall, (in the absence of manifest error) unless otherwise provided in this Agreement, be conclusive evidence that such amount is in fact (due) and payable.

LAW AND JURISDICTION

58. The parties hereto agree that this Agreement shall be governed by the laws of Malaysia and agree to submit to the jurisdiction of the Courts of Malaysia and further agree that service of any legal process may be effected in the manner set out in Clause 56.

RIGHTS OF BANK ON BORROWER'S DEFAULT

60. If the Borrower shall commit a default pursuant to Clause 6 or if any of the events stipulated in Clause 6 hereof shall happen and which if capable of remedy is not remedied within a period of seven (7) days from the date of notice by the Bank requesting remedy of the same, or is not remedied within the time specifically stipulated thereof (if any) in respect of the event in question, the said banking facility, interest thereon and all other sums payable under this Agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and whereupon the Bank shall be entitled without further notice to the Borrower to exercise the rights and power of the Bank of assignment hereunder as the attorney of the Borrower as stipulated in Clause 5 of this Agreement and to deal with all the rights and interests of the Borrower in relation to the Said Contract or otherwise in all respects as the person absolutely and beneficially entitled thereto.

BANK'S RIGHTS TO COMMENCE LEGAL PROCEEDINGS CONCURRENTLY

61. Notwithstanding any provision hereof, it is hereby expressly agreed that upon default or breach by the Borrower of any term, covenant, stipulation and/or undertaking herein provided and on the part of the Borrower to be observed and performed, the Bank shall thereafter have the right to exercise all or any of the remedies available whether under this Agreement or by statute or otherwise and shall be entitled to exercise such remedies concurrently against the Borrower, to recover all monies due and owing to the Bank without having exhausted its right to realise its security under this Agreement.

The sting of the deed of assignment can be found in cl. 3 thereof. When the borrower – referring to the second defendant, had repaid all the moneys owing to the bank (fourth defendant) together with all interests thereto then the borrower shall be entitled at its own costs and expenses to obtain a discharge and release of the assignment. The ingredient of repayment makes the assignment conditional and this should be the correct way to interpret the deed of assignment. It makes not a whit of a difference that the deed of assignment, in the present case, was conditional because the validity of that assignment can never be questioned. This was my judgment and I so hold accordingly.

Not to be outwitted, the plaintiff launched a concerted attack against the deed of assignment. It was argued that the deed of assignment was not effective because the second defendant was in breach of the contract. Two main grounds were advanced for attacking the deed of assignment:

(1) that the first defendant's acceptance of the deed of assignment was conditional upon the second defendant not being in breach of the contract; and

(2) since the second defendant was in breach of the contract by failing to pay the plaintiff, the assignment was said to be ineffective.

but, with respect, these two submissions were totally misconceived and several reasons may be advanced for such a stand:

(1) the second defendant cannot assign to the fourth defendant more than what it has; so the second defendant can only assign whatever rights it has in the moneys payable by the first defendant under the contract to the fourth defendant;

(2) the first defendant too was only bound to pay to the fourth defendant the moneys which were payable to the second defendant under the contract, it would also be true that if the second defendant was not entitled to be paid the moneys under the contract due to the second defendant's breach of the terms of the contract, then the moneys was also not payable by the first defendant to the fourth defendant under the assignment;

(3) the maxim *nemo dat quod non habet* – no one gives what he does not possess, would definitely be activated to the facts of the present case;

(4) the contract for the construction of the Giant hypermarket was entered between the first defendant as the employer and the second defendant as the main contractor; the plaintiff was not a party to the contract at all and so there cannot be a breach of the plaintiff''s rights under the contract;

(5) there was no privity of contract between the plaintiff and the first defendant (*Joo Yee Construction Pte Ltd (In Liquidation) v. Diethelm Industries Pte Ltd & Ors (supra)* and *Royden (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd (supra)*);

(6) the second defendant's obligation to pay the plaintiff was not the subject of the contract between the first defendant and the second defendant but rather it was governed by the sub-contract entered into between the second defendant and the plaintiff as seen in encl. 2 of exhibit "SSH 1" which was reproduced in the early part of this judgment; and so if there was ever a breach that breach would relate to the breach of the sub-contract and not the contract that was entered into between the first defendant and the second defendant;

(7) there was no suggestion at all from the first defendant that the second defendant was in breach of the terms of the contract; and

(8) so the fourth defendant was entitled to be paid the moneys payable by the first defendant to the second defendant under the contract by virtue of the deed of assignment.

Reverting back to the issue of privity of contract, I need to cite certain passages from a book entitled "Law and Practice of Construction Contract Claims", second edition by Chow Kok Fong where, at p. 226, the learned author said:

> A subcontract executed between a main contractor and subcontractor cannot give rise to any privity of contract between the subcontractor and employer. This is because subcontracting operates as a subletting of the physical construction of the works only and does not constitute an assignment of rights and liabilities under the main contract. The main contractor thus continues to be responsible to the employer for the whole of the works and to be liable for any defective work, delay or any other default committed by his subcontractors.
>
> There have been occasions in the past where it has been contended that this position may not apply to some situations, particularly, where the subcontractors have been nominated by the employer or where the employer (or his architect or engineer) has otherwise intervened in the choice of subcontractors. This view was canvassed largely on the premise that the main contractor, in the placement of nominated subcontracts, acts as an agent for the employer. However, as noted by one leading commentator, such a result can only be produced by 'the most special and unusual facts showing that the employer expressly or by his conduct authorised the main contractor or the architects so to contract …[because it is] … contrary to the sense of the usual main contract and the most universal practice in the building industry (Hudson, 10th ed (1970) p 742)'.

and these passages would certainly fortify the argument that there was an absence of a contractual relationship between the plaintiff and the first defendant. It was a clear cut case, in the context of the present case, that the privity rule should be vigorously applied to the detriment of the plaintiff.

Would Damages Be An Adequate Remedy?

Basically as can be seen from the facts of the case, the plaintiff's claim was essentially a monetary claim for moneys due and owing by the second defendant. As I said the plaintiff was an unsecured creditor of the second defendant. In the circumstances, damages would not only be an adequate remedy it was, in fact, the only remedy known in law.

The Question Of The Balance Of Convenience And Whether There Are Any Special Factors

I reiterate that the plaintiff's claim was monetary in nature. The fourth defendant is a financial institution in the country. In the event that after a trial this court were to find that the moneys under the deed of assignment ought not to have been paid to the fourth defendant, the court would accordingly order the fourth defendant to reimburse that sum – as a financial institution the fourth defendant would certainly be able to repay that sum with ease. For this very reason, the balance of convenience would certainly tilt in favour of the fourth defendant and, consequently, the injunction that was sought under prayer (i) of encl. 3 should not be allowed. In my judgment, there were no special factors to justify the plaintiff in obtaining prayer (i) of encl. 3.

For the reasons adumbrated above, I dismissed enclosure 3 with costs.